IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 08-10-2007

CORAM

THE HONOURABLE MR. JUSTICE S. PALANIVELU

Crl.O.P.No.28080 OF 2007

S.Suresh ... Petitioner

-vs-

State, represented by Inspector of Police,
Kadathur Police Station,
Dharmapuri District. ... Respondent

Petition under Section 482 of the Code of Criminal Procedure.

For Petitioner : Mr.M.Ravi

For Respondent : Mr.A. Saravanan,
Government Advocate (Crl. Side)

O R D E R

This petition has been filed to call for the records in connection with F.I.R.No.212 of 2007 on the file of Kadathur Police, Station, Dharmapuri District, and to quash the same.

2. De facto complainant is a married woman, who has got twin boys, aged three years, and a daughter. She is living away from her husband, in view of certain misunderstandings. Sons are with her husband, while she is maintaining the daughter. She is working as a teacher in Panchayat Union Elementary School in Veppilaipatti village. She used to attend the teachers' meeting every month in Thalanattam Panchayat Union Middle School. The accused, who too is a teacher in Panchayat Union Elementary School in Nattamedu, also used to participate in the said meetings. He voluntarily began to get familiarity with her. While he is a brahmin, she belongs to Adi-dravidar community. She had informed him about her family circumstances. He represented that he was a bachelor and

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made her to believe that he would marry her, thereby asking her to come with him to some places. But, since she refused, both of them used to go to house No.875 in Vennampatti Housing Board and have carnal intercourse on several occasions from March,2007. On 14.04.2007, he took her to Mohana Lodge, Krishnagiri, stayed there and had coitus with her. They vacated the room in the evening of 15.04.2007. Because of him, she is now pregnant by two-and-a-half months. The accused refused to marry her and disconnected her relationship. Therefore, a case has been registered in Crime No.212 of 2007 on the file of respondent police for the offences under Sections 376 IPC and Section 3 (1) (xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

3. Learned counsel for the petitioner would vehemently contend that for employing Section 376 IPC, the complaint does not bear any allegations and as per the situation of the de facto complainant, namely, her avocation and status i.e., to say, she was a married woman, living with children, by no stretch of imagination, it could be stated that she was sexually exploited by the accused forcibly. It is his further contention that none of the ingredients enumerated in Section 375 IPC would apply to the facts of the present case and the alleged offence under Section 376 did not exist. It is also his argument that the de facto complainant gave her free consent for intercourse as per her allegation and there was no obnoxious intention on the part of the accused to spoil her life and, therefore, no offence could be made out under Section 376 IPC.

4. It is beneficial to refer Section 90 IPC, which reads as under :

> "90.Consent known to be given under fear or misconception.- A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception."

5. Learned counsel for the petitioner placed much reliance upon a decision of the Hon'ble Supreme Court in State of U.P. through C.B.I.,S.P.E., Lucknow, v. R.K.Srivastava and others, AIR 1989 SUPREME COURT 2222, in which it has been held that it is a well settled principle of law that if the allegations made in the FIR are taken at their face value and accepted in their entirety do not constitute an offence, the criminal proceedings instituted on the basis of such FIR should be quashed. But, the facts in the case on hand are different. In this case, the allegations are sufficient to constitute the offence.

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6. The learned counsel also cited a decision of the Supreme Court in Uday v. State of Karnataka, 2003 (4) Supreme Court Cases 46, wherein certain guidelines have been formulated, to infer the fact of "consent", which are as below :

> "For determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, held there is no straitjacket formula and each case has to be decided considering the evidence and surrounding circumstances of the case – where (i) the prosecutrix (aged 19 years on the date of occurrence) had sufficient intelligence to understand the significance and moral quality of the act she was consenting to, (ii) she was conscious of the fact that her marriage with the applicant was difficult on account of caste considerations, (iii) it was difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise, and (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix, held, appellant's conviction and sentence under S.376 IPC was liable to be set aside."

7. Paragraph 25 of the above said ruling goes to the effect that in order to constitute the consent under Section 90 IPC, firstly, it must be shown that the consent was given under a misconception of fact and, secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception.

8. As far as the facts of the present case are concerned, we are in the first stage i.e., the consent was given under a misconception of fact and the proof is a subsequent affair, since the case has to reach its stage of trial. It is further observed in the said decision as follows :

> 25....As stated by the prosecutrix, the appellant also made such a promise on more than one occasion. In such circumstances, the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a week moment, succumb to the temptation of having sexual relationship. This is

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what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances, it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise...."

9. Another decision in Deelip Singh v. State of Bihar, 2005 (1) Supreme Court Cases 88, was also relied upon by the learned counsel for the petitioner, in which it was observed as under :

"Though will and consent often interlace and an act done against the will of a person can be said to be an act done without consent, the Indian Penal Code categorises these two expressions under heads in order to be as comprehensive as possible. Further, it is not easy to find a dividing line between submission and consent except in the situation contemplated by clause fifthly of Section 375 IPC. Yet, the evidence has to be carefully scanned. The ultimate conclusion depends on the facts of each case."

10. It is the further contention of the learned counsel for the petitioner that since the de facto complainant is a full-grown girl, capable of understanding the consequences while she gave consent to the sexual intercourse and became pregnant, the consent obtained from her could not be deemed to have been obtained by misconception.

11. In the above judgment, it was opined that even though consent cannot be said to have been obtained under a misconception of fact, the Courts have to consider the question of consent, after appreciating the materials available in a particular case.

12. In a recent decision of the Supreme Court in Pradeep Kumar @ Pradeep Kumar Verma v. State of Bihar and Anr., 2007 (3) Crimes 346 (SC), the scheme of Section 90 IPC has been elaborately dealt with and "what would be the consent" obtained from the victim would come under the category of "consent obtained by fear or misconception." The Apex Court also considered Uday's case, stated supra, and laid down a law as follows :

"20.....By making the solitary observation that a false promise is not a fact within the meaning of the Code, it can not be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification

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> that no straitjacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday case as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accuseds intention to marry cannot be ruled out."

13. Hence, the legal principle to be applied in similar cases is that the Court has to see whether the person giving the consent has given it under fear or misconception of fact and the Court should also be satisfied that the person doing the act i.e., the alleged offender is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given.

14. As per Section 90 IPC, "consent" must be a voluntary one and it could not be under misconception of fact or misrepresentation or by fraudulent means. Obtaining consent for sexual intercourse on the promise of marriage should fulfil the requirements, adumbrated in Section 90. In order to infer a qualified consent free from any legal flaw, the allegations in the F.I.R.may not be sufficient. Even though the consent was a voluntary one, if the Court finds that it was obtained by misconception of fact or misrepresentation, it will suffer from illegality. The consent or absence of it could be gathered from the attendant circumstances. On the face of it, it is learnt that the accused knew of the misconception or had reason to believe that the victim would act upon it.

15. As far as the facts of this case are concerned, it is only in the F.I.R. stage and investigation is pending. Only if the trial reaches its logical conclusion, the real intention of the accused would be unearthed, by appreciating the materials available in the evidence on record.

16. Learned Government Advocate (Criminal Side) would cite a decision of the Apex Court in Yedla Srinivasa Rao v. State of A.P., 2006 (9) SCALE 692, wherein, the Supreme Court, after referring to the principles laid down in Uday's case, considering the facts of the case, was satisfied that the consent which had been obtained by the accused was not a voluntary one which was given by her under misconception of fact that the accused would marry her, but this is not a consent in law, which is more evident from the testimony of P.W.1 and P.W.6 who was functioning as Panchayat where the accused admitted that he had committed sexual intercourse and promised to marry her, but he absconded despite the promise made before the Panchayat, and, hence, the question as to whether the consent obtained from the de facto complainant by the accused was under misconception of fact has to be decided, only after scanning and analysing the oral evidence on record.

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17. In the above said decision, the Apex Court has referred to various decisions and concluded as stated above. Following the principles of law laid down by the Supreme Court, it must be observed herein that whether the consent was obtained fraudulently by the accused would be decided on the merits of the case and on the basis of the allegations available in the F.I.R. Since the allegations in this case have prima facie constituted the offence under Section 376 IPC, there would be no question of quashing the F.I.R. at this stage.

18. Learned counsel for the petitioner further submitted that there is no sufficient material on record to implicate the accused, for the offence under Section 3 (1) (xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

19. In this connection, it is worthwhile to refer to Section 3 (1) (xii) of the Act, which reads as under :

> "being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed"

20. The allegations in the F.I.R. would go to the effect that the de facto complainant had already informed the accused of her situation and he also knew about her fully. It goes to show that the accused was very well aware that the de facto complainant belonged to Adi-dravidar community. The aforesaid version in the FIR would be a prima facie material to show the attitude of the accused, attracting the said provision.

21. In the light of the above discussions and following the ratio laid own by the Apex Court, the F.I.R. could not be quashed. As a result, this petition is dismissed. Consequently, the connected Crl.M.P.No.1 of 2007 is also dismissed.

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To

1. The Judicial Magistrate No.2,
   Dharmapuri.

2. -Do- Though The Chief Judicial Magistrate,
   Dharmapuri at Krishnagiri.

3.The Inspector of Police,
   Kadathur Police Station,
   Dharmapuri District.

4.The Public Prosecutor,
   High Court, Madras.

+1 cc to Mr.M.Ravi, Advocate Sr.No.62247.

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